IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 1164 of 1995

For Approval and Signature:

HON'BLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KANUBHAI NARANBHAI PATEL - Applicant(s)

Versus

FAKIRBHAI SHANABHAI PATEL & 1 - Opponent(s)

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Appearance :
MR. SHEETAL PATEL for MR AJ PATEL for Petitioner No(s).: 1.

MR AR MAJMUDAR for Respondent No(s).: 1.
RULE SERVED BY DS for Respondent No(s).: 2.
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CORAM : HON'BLE MR.JUSTICE A.M.KAPADIA

Date : 03/08/2005

ORAL JUDGMENT

1. By instant petition under Section 115 of the Code of Civil Procedure, the petitioner seeks to challenge the order dated 17.4.1995 rendered in Civil Revision

Application No. 4 of 1993 by the learned 2nd Joint District Judge, Vadodara by which the Revision Application filed by the opponents came to be allowed and thereby order dated 22.10.1992 recorded below application exh.60 in Regular Civil Suit No. 162 of 1991 by the learned Civil Judge (JD), Padra is quashed and set aside and accordingly it was directed to restore the Regular Civil Suit No. 162 of 1991. The order further stipulates that after restoration of the suit, the learned trial Judge shall decide Exh.12, the application filed by the defendant no.1 for restoration of possession of the suit premises and thereafter decide remaining applications on record.

2. The Petitioner had filed Regular Civil Suit No. 162 of 1991 in the Court of the learned Civil Judge (JD), Padra for recovering possession of the suit premises described in paragraph 1 of the plaint, inter alia, on the grounds that the opponents have discontinued the user of the suit premises since more than two years; the premises are lying closed since 1.3.1988; the opponents have acquired alternative accommodation in Bombay and Kural; and that the opponents are in arrears of rent since more than six months immediately preceding the date of the suit.

3. The suit was contested by opponent No.1 by filing written statement, inter alia, denying all the averments made in the plaint. It was contended that the wife of opponent no.1 has taken the suit premises on rent from the mother of the petitioner, that the mother of the petitioner had accepted an amount of Rs.20,000/- by way of deposit from the wife of opponent no.1, that Sushilaben, wife of the said opponent has been running a business in the name of Ambica General

Stores on the ground floor of the suit premises, that the rent of the suit premises is excessive and it is not a standard rent, and therefore prayed to dismiss the suit.

4. According to the petitioner, thereafter the parties to the suit settled their disputes outside the Court and the opponents handed over the possession of the suit premises to the petitioner on 2.8.1992 and the possession was handed over by opponent no.2 without intervention of the Court. According to the petitioner since the possession of the suit premises was already handed over to the petitioner and since the remaining disputes were also settled between the parties outside the Court, the petitioner did not want to proceed with the suit and therefore filed purshis Exh.60 in the said suit under Order 23, Rule 1 of the Code, stating therein that he would like to withdraw the suit unconditionally. The learned Civil Judge (JD), Padra accepted the said purshis and by his order dated 20.10.1992 directed that the purshis be taken on record.

5. Aggrieved thereby the opponent had filed Civil Revision Application No. 4 of 1993 in the Court of learned 2nd Joint District Judge, Vadodara which was placed for hearing before the learned Joint District Judge, Vadodara, who vide order dated 17.4.1995 allowed the said revision and thereby quashed and set aside the order dated 22.10.1992 recorded below application exh.60 in Regular Civil Suit No. 162 of 1992 permitting the petitioner to withdraw the suit has been quashed and set aside, which has given rise to the present petition at the instance of the original plaintiff.

6. Mr. Sheetal Patel, learned advocate for the petitioner has contended that the learned trial Judge has committed an error in appreciating that there is no provision of law which would compel a party to proceed with the suit once it has withdrawn the suit in accordance with law. According to him the suit premises was handed over to the petitioner by opponent no.2 without intervention of the Court and on that basis the petitioner had decided not to proceed with the suit and the learned trial Judge had also made an order in that behalf below purshis filed by the petitioner. Therefore according to him no illegality or infirmity is committed by the learned trial Judge. However the learned Joint District Judge has interfered in exercise of powers conferred under the limited power of revisional jurisdiction. According to him, the learned Joint District Judge has committed an error in ignoring the mandatory provisions of Order 23 Rule 1 of the Code, which confer unqualified right on the plaintiff to withdraw the suit and there is no provision in the Code which empowers the Court to refuse permission to withdraw the suit and to compel the plaintiff to proceed with it. In support of the aforesaid contention Mr. Sheetal Patel, learned advocate of the petitioner has also placed reliance on the reported decision of this Court in the case of Patel Dineshbhai Mohanbbai v/s. Decd. Naranbhai Ramdas Through Legal Heirs, 2005 (1) G.L.H. 505.

7. On the aforesaid premises he contended that the order impugned under this petition deserves to be quashed and set aside by allowing this petition. He, therefore, urged to allow this petition.

8. Mr. A.R.Majmudar, learned advocate of the opponents

supported the order which is impugned under instant revision. According to him, no illegality or infirmity, much less jurisdiction error has been committed by the learned 2nd Joint District Judge, Vadodara in passing the impugned order, therefore according to him this revision application lacks merit, deserves to be rejected. He, therefore, urged to reject the petition.

9. This Court has considered the submissions advanced by the learned advocates appearing for the parties, perused the impugned order as well as the judgement cited at the bar.

10. So far as the factual matrix is concerned, there is no dispute with respect to the filing of the suit by the petitioner seeking decree of eviction of the suit premises against the opponents on various grounds. According to the petitioner, during the pendency of the suit, the parties have settled the dispute outside the Court and therefore opponent No.2 has handed over the vacant and peaceful possession to the petitioner. The petitioner therefore passed a pushis at Exh.60 seeking permission to withdraw the suit unconditionally.

11. It may be noted that the learned trial Judge has not issued notice to the opponents nor the learned advocate of the opponents was called upon before passing the order below application exh.60. It may also be noted that before permitting the withdrawal of the suit,opponent Nos. 1 and 2 have already filed application exh.12 inter alia contending that during the pendency of the suit, the petitioner has forceably taken the possession of the suit premises. The said application was pending. At the time of permitting to withdraw the suit the petitioner has filed application

to delete opponent no.1 which was also pending.

12. In the case of Patel Dineshbhai Mohanbhai (supra), this Court has not laid down the absolute proposition of law that to withdraw the suit unconditionally is an absolute right of the plaintiff. In the said judgement, this Court has also said that however as an exception Court can refuse it in a case where there is counter-claim or set-off. Therefore, according to this Court, the ratio laid down in the aforesaid case cannot come to the rescue of the petitioner's case. In the instant case application exh.12 filed by the opponent was already pending and before adjudicating the same, trial Court ought not to have allowed the withdrawal of the suit. The learned 2nd Joint District Judge, Vadodara in paras 21 and 22 of the impugned order has observed as under:

"**21.** *It appears from the record and proceedings of the lower Court that on 2.11.1992 all of a sudden the plaintiff appeared before the lower Court and without informing the other side gave purshis vide exh.60 for withdrawal of the suit stating that on 2.8.1992 the defendant no.2 had handed over the possession of the suit premises to him and that the defendant no.1 has stated that he is not a tenant of the suit premises, it was, therefore, requested that in view of these circumstances, they do not want to proceed with the suit. The learned trial Judge had, without giving opportunity of hearing to the defendants straightway granted the withdrawal purshis of the plaintiff with belief that the Court cannot refuse the prayer of the plaintiff to withdraw the suit. This approach of the learned trial Judge is absolutely illegal and improper. While passing order below withdrawal purshis vide exh.60, the learned trial Judge was required to see the circumstances of the case and to see that the application for restoration of possession was pending on record. He had also to see that during pendency of the suit, a right has accrued in the defendant for restoration of possession of the suit premises. The procedure adopted by the learned trial Judge on the application of withdrawal of the suit under Order XXIII Rule 1 C.P. Code despite the right has accrued in the*

defendant is not a permissible procedure and in my opinion the trial Court in such cases ought not permit withdrawal of the suit until the entitlement of the other party for restoration of possession is determined. The plaintiff under sub-rule 1 Rule 1 of Order XXIII has a right to withdraw a suit at any stage. However, such a right of the plaintiff is limited to the extent that it does not result in defeating a right which has already vested in the defendant. The same view has been taken by our own High Court in the case of Kutubuddin Sarfuddin Munshi v/s. Shrimatiben Induprasad and others, 23 GLR 29.

22. *Moreover, under Order XXIII Rule 1, sub-rule (1) a plaintiff has a right to withdraw suit unconditionally, but after all it is a rule of procedure and it is well settled that procedure is to aid justice and not to defeat it. Therefore, considerations of justice and equity have to be kept in view before granting the prayer of a plaintiff to withdraw from a suit. Now, what would be the result if the plaintiff is allowed to withdraw from the present suit. The result will be that the defendants would not be able to take their possession back and they will have to file a separate suit against the plaintiff-opponent-landlord for the suit premises and that will lead multiplicity of proceedings."*

The observations made above are the complete answer to the submissions advanced by Mr. Sheetal Patel, learned advocate of the petitioner. Mr. Sheetal Patel, learned advocate of the petitioner is unable to dislodge the said findings recorded in paragraphs 21 and 22 of the impugned judgement and order.

13. In aforesaid view of the matter, according to this Court, no illegality or infirmity, much less jurisdictional error has been committed by the learned 2nd Joint District, Vadodara in passing the impugned order. On the contrary, the said order is passed to do the complete justice between the parties.

14. In the above context, this Revision Application lacks merit and deserves to be rejected.

15.For the foregoing reasons, the petition fails and accordingly it is rejected with no order as to costs. Rule is discharged. Interim relief granted earlier shall stand vacated.

16.The learned trial Judge is directed to give top priority to the hearing of Regular Civil Suit No. 162 of 1991 along with all the applications and shall try to decide and conclude the same on or before 31.12.2005.

(A.M.Kapadia,J)

Jayanti*